

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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15-4813

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ANTONIO MORALES

Appellant

v.

ROBERT A. MCDONALD  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## APPELLANT'S REPLY ARGUMENTS

### I. The Board's analysis of the Veteran's symptoms was inadequate.

The Secretary argues that the Board's analysis in regard to whether the Veteran's symptoms were contemplated by his assigned schedular rating was adequate because it "discussed" the Veteran's symptoms and "therefore appropriately considered the severity of [the Veteran's] complete disability picture." Sec. Br. at 10-12. However, the Secretary cites the portion of the Board's decision that merely lists the Veteran's symptomatology. *Id.* (citing R-10-14).

The Veteran does not dispute that the Board listed the Veteran's symptomatology at the beginning of its decision. Apa. Open Br. at 10. Yet "merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons or bases." *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) (*quoting Abernathy v. Principi*, 2 Vet.App. 461, 465 (1992)); Apa. Open Br. at 10. Therefore, the Secretary's assertion that the Veteran's "argument amounts to nothing more than a request that the Court re-weigh the evidence" is misguided and unsupported. Sec. Br. at 11-12. The Board failed to analyze what *impacts* Mr. Morales' symptoms had based on the severity of his symptoms and whether, taken together, they resulted in occupational and social impairment with reduced reliability and productivity. *See* R-3-14. Because the Board's analysis constituted a conclusory list of the symptoms the Veteran did not exhibit, its decision did not comply with the law and remand is required. R-14-15; Apa. Open Br. at 10.

The Secretary acknowledges the Veteran's assertion that the "Board's statement of reason[s] or bases was inadequate" for its discussion of whether an increased rating was warranted for the Veteran's PTSD. Sec. Br. at 13 (citing Apa. Open Br. at 19). He then quotes case law holding that the Board provides adequate reasons or bases when its decision allows a veteran to understand the precise basis for its decision and facilitates judicial review. *Id.* (citing *Allday v. Brown*, 7 Vet.App. 517, 527 (1995)). In response, the Secretary summarily posits that "[h]ere, the Board's analysis meets those criteria[.]" *Id.* However, the Secretary fails to provide *any* support for this bare assertion. *See id.* Moreover, the Secretary "importantly" asserts that Mr. Morales has not alleged that the Board's analysis was inadequate. *See id.* at 13-14.

This argument is meritless as the Veteran provides ample analysis and case law discussing the necessity for adequate reasons or bases to support the Board's decision. *See* Apa. Open Br. at 9, 10, 14, 19. The Veteran asserts that the Board failed to do so. *See id.* Mr. Morales' arguments regarding the inadequacies of the Board's reasons or bases are thorough and clear. *See id.* Because a plain reading of the Veteran's open brief evidences the contrary, the Court should reject the Secretary's argument that Mr. Morales "has not alleged that [the Board's analysis] does not [meet the criteria for an adequate statement of reasons or bases]." Sec. Br. at 13-14.

**II. The Board failed to properly consider whether an earlier effective date was warranted.**

The Secretary urges the Court to reject the Veteran's argument that the Board misinterpreted the law when it failed to examine evidence post-dating October 2, 2012 in denying him a rating in excess of 50 percent for his PTSD between May 18, 2009 and October 2, 2012. Sec. Br. at 12; Apa. Open Br. at 15-17. The Secretary grounds his argument on the assertion that because the November 2012 VA examiner stated that the symptoms the Veteran endorsed in his October 2012 VA examination did not reflect his symptoms prior to that date, the Board's selection of the date of increase was "completely appropriate[.]" Sec. Br. at 12.

It is the duty of the Board, not the Secretary, to provide adequate reasons or bases for the decision on appeal. *See Wanless v. Principi*, 18 Vet.App. 337, 343 (2004) (Steinberg J., concurring). The Board's analysis discussed the November 2012 addendum opinion. R-19-20. The examiner opined that based on the Veteran's history, his anger, anxiety, and irritability was moderate, and the Board relied on the examiner's finding regarding the severity of these symptoms to in assigning an effective date for an increased rating. R-19-20; R-116 (noting the Veteran's "documented history that his anxiety of anger and irritability have been no more that [sic] to a moderate degree").

However, the Veteran retrospectively reported other symptomatology commensurate with an increased rating. For example, the Veteran's compulsivity,

including checking locks and fear of shootings in his windows, was present before 2012. R-147; R-159; R-182; R-572; R-1096; R-1098; R-1100; *see* R-118-26. The Veteran endorsed having “few friends, limited leisure time activities, and practically no social life” in October 2012, R-122, and the Board acknowledged the Veteran’s desire “to be left alone” in December 2011. R-12-13. Mr. Morales also slept with a machete and bat near his bed while dreaming about “getting upset and out of control” as well as his “potential for rage.” R-159; R-572.

Earlier evidence also supports an increased rating. The 2010 VA examination report discussed the Veteran’s obsessive compulsive rituals and vigilance. R-572-73. The following year, a mental health provider noted “evidence of some obsessive and compulsive tendencies” the Veteran complained of significant “distress when things [were] out of place.” R-1098; R-1100. He also admitted to homicidal thoughts. R-147.

The Board failed to analyze the retrospective nature the symptomatology the Veteran endorsed during the examination in light of the symptoms he experienced during the earlier time period, in addition to anger, anxiety, and irritability, in assigning a 50 percent rating through the date of the October 2012 examination but a 70 percent evaluation thereafter, based on the symptoms he reported on that date. *See* R-19-21. Instead of adopting the date of the examination and the examiner’s opinion without assessing the entirety of the retrospective evidence, the Board should have considered whether an earlier date for an increased rating could be ascertained. *See*

*McGrath v. Gober*, 14 Vet.App. 28, 35 (2000). Remand is required for the Board to properly interpret the law in assigning an effective date for the staged ratings.

### **III. The Board improperly considered the effect of the Veteran's medications.**

The Veteran noticed a decrease in his symptoms after starting a medication regimen. *See* R-1091. He asserts that the Board erred by improperly relying on the ameliorative effects of medication when it accepted the VA examiner's conclusion that his symptoms decreased during that period, or at the very least, that it is unclear from the Board's decision if it considered these effects. *Apa. Open Br.* at 17.

The Secretary responds by asserting that "[t]he rating schedule for psychiatric disabilities contemplates the effects of medication." *Sec. Br.* at 13. Although the general rating formula for PTSD under 38 C.F.R. § 4.130 contemplates the need for continuous medication in the 0 and 10 percent rating criteria, the "need for continuous medication" suggests a minimum standard to be met for the assignment of those ratings, and not necessarily ameliorative benefit or "control" of symptoms through the use of medication. In other words, the general rating formula requires the Board to inquire whether a claimant's mental disorder requires continuous medication, but there is nothing in the formula that directs the Board to consider relief from those symptoms afforded by medication when assigning a rating. Accordingly, the Board's improper reliance on the potential effects of medication in controlling the Veteran's disability was in error.

## CONCLUSION

The Board erred when it misinterpreted the law and failed to adequately consider whether the Veteran's symptomatology approximated an increased rating. The Board further erred by relying on examiners' conclusions of the severity of the Veteran's symptoms. Moreover, the Board committed prejudicial error when it erroneously failed to consider whether the symptoms the Veteran retrospectively reported warranted an earlier effective date for the assigned staged rating.

Based on the foregoing reasons, as well as the arguments contained in the Veteran's opening brief, the Court should vacate the Board's decision and remand the appeal with instructions to readjudicate the issue of Mr. Morales' entitlement to an increased rating for PTSD prior to October 2, 2012 in accordance with the Court's opinion.

Respectfully Submitted,

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